

**FINDINGS AND REMEDIES OF THE SPECIAL MASTERS
PURSUANT TO SECTION 10.3(i) REGARDING 66 MONETARY AWARD CLAIMS**

I. INTRODUCTION.

Pursuant to Section 10.3 of the Settlement Agreement and Rule 7(b) of the Rules Governing Audit of Claims (the “Audit Rules”), the Claims Administrator audited 62 Monetary Award claims supported by neuropsychological testing from seven neuropsychologists (referred to hereinafter as “these neuropsychologists”) who used substantially the same template report used by Dr. Serina Hoover (for more information on Dr. Hoover, see Findings and Remedies of the Special Master Pursuant to Section 10.3(i) Regarding 153 Monetary Award Claims (Document 9507)). These neuropsychologists are: Drs. Daniel Zehler, Charles Furst, Therese Moriarty, Julia Johnson, Julie Keck-Olson, Nicole Anders and Phillip Pines. The Claims Administrator’s investigation included reviews of relevant records, interviews with relevant individuals, and consultation with an Appeals Advisory Panel Consultant (“AAPC”).

The Claims Administrator concluded that these neuropsychologists misrepresented information submitted to the Program in connection with the 62 Monetary Award claims. On 2/28/18, the Claims Administrator referred these 62 Monetary Award claims to the Special Masters for review and findings pursuant to Section 10.3(i) of the Settlement Agreement and notified the affected Settlement Class Members. Since making the referral, the Claims Administrator identified an additional four claims that rely on evaluations from one of these neuropsychologists and these four will be subject to the same treatment as the 62 claims addressed in the Audit Report. The Special Masters reviewed the Record of the Audit Proceeding and issue these findings and remedies.

II. REVIEW OF FACTS.

The Claims Administrator began auditing claims supported by neuropsychological testing from these neuropsychologists after finding that the neuropsychological reports that they used were remarkably similar in their form and in their actual wording to the report template that Dr. Serina Hoover used. The Claims Administrator sought to determine whether the testing results from these neuropsychologists presented misrepresentations, omissions, or concealment of material fact.

The Claims Administrator asked an AAPC to review seven sample reports from these neuropsychologists. The AAPC concluded that these neuropsychologists’ reports were problematic as follows:

1. Their assessments often violated standardized procedures.
2. They ignored test results indicating invalid performances.
3. They accepted player self-reports of impairment at face value, despite indications that players exaggerated or demonstrated unbelievable symptoms in light of the standardized, validated tests.

4. Even if the players' test scores were valid, the doctors did not always reach diagnostic conclusions suggested under the Settlement Agreement framework.
5. They grossly inflated the time they spent on assessments.

The Claims Administrator attempted to interview these neuropsychologists and report the following:

Drs. Furst and Moriarty stated that they got the report template from Peter Shahriari of the Law Office of Hakimi & Shahriari (f/k/a Top NFL Lawyers). Dr. Gabichvadze, the director of the Psych Testing Center where Drs. Olsen-Keck, Pines, and Anders performed neuropsychological evaluations of players, stated that the doctors at the Center also received the template from Mr. Shahriari. Dr. Johnson was too busy for an interview and asked the Claims Administrator to direct any questions to Mr. Shahriari. Dr. Zehler informed the Claims Administrator that his employer was an acquaintance of Dr. Hoover and that she instructed him on how to perform his evaluations; Dr. Zehler used Dr. Hoover's psychometrists.

Regarding evaluation timing, Drs. Zehler and Keck-Olson performed multiple test sessions on the same day, which the AAPC stated devalues the reliability of the submitted reports. Even if some of Dr. Zehler's recorded hours should instead be attributed to the psychometrists Dr. Hoover recommended, the multiple evaluations on the same day suggest that the time billed for the testing was inflated. Table 1 lists the dates and times Dr. Zehler spent testing and evaluating the players, excluding report preparation time, which Dr. Zehler says occurred on another day:

Table 1	Multiple Players Dr. Zehler Evaluated on the Same Day	
Testing Date	Players Examined	Total Hours Spent
5/27/17	4	52.25
5/31/17	3	39
6/7/17	3	39.25
5/2/17	2	20
6/10/17	2	27.25
8/9/17	2	27.25
8/16/17	2	25

Dr. Keck-Olson evaluated and tested two players apiece on 11/21/16 and 12/1/16 for 15 hours each. Dr. Keck-Olson's reports state that testing, scoring and interpreting testing, and report preparation all occurred on the same date. She said she did all the testing herself. For all 16 of her reports, Dr. Keck-Olson indicated that testing took seven hours, scoring and interpretation took three hours and report preparation took five hours. Performing 30 hours of work in one day is impossible and suggests inflated billing. These dates and times spent are listed in Table 2:

Table 2	Multiple Players Dr. Keck-Olson Evaluated on the Same Day	
Player Testing Date	Players Examined	Total Hours Spent
11/21/16	2	30
12/21/16	2	30

The Claims Administrator also noted potential discrepancies between players' Level 2 Neurocognitive Impairment determinations by these neuropsychologists, and the activities and/or employment reported by the players. According to an Appeals Advisory Panel ("AAP") member, a player's continued ability to function independently outside the home should be considered a "red-flag" that a diagnosis of Level 2 Neurocognitive Impairment may not be consistent with the clinical abilities. Twelve claims were analyzed in which the player received a Level 2 Neurocognitive Impairment Qualifying Diagnosis but told the neuropsychologist that he was working or studying. In seven of these instances, the players engaged in significant employment or other activities.

III. CONCLUSION AND REMEDIES.

Under Section 10.3(i) of the Settlement Agreement, the Special Masters' review and findings may include the following relief, without limitation: (a) denial of the claim in the event of fraud; (b) additional audits of claims from the same law firm or physician (if applicable), including those already paid; (c) referral of the attorney or physician (if applicable) to the appropriate disciplinary boards; (d) referral to federal authorities; (e) disqualification of the attorney, physician and/or Settlement Class Member from further participation in the Class Action Settlement; and/or (f) if a law firm is found by the Claims Administrator to have submitted more than one fraudulent submission on behalf of Settlement Class Members, claim submissions by that law firm will no longer be accepted, and attorneys' fees paid to the firm by the Settlement Class Member will be forfeited and paid to the Settlement Trust for transfer by the Trustee into the Monetary Award Fund.

Upon review, the Special Masters find that claims relying on these neuropsychologists' testing may involve a misrepresentation, omission, or concealment of a material fact. Accordingly, and pursuant to Section 10.3 of the Settlement Agreement and Audit Rule 31(i), the Special Masters order these remedies for the 66 claims based on testing by these neuropsychologists (and any future claim resting on neuropsychological testing by one of these neuropsychologists):

- 1. Individualized Assessment by the AAP:** The Monetary Award claims that rely on neuropsychological testing by any one of these neuropsychologists shall be directed to a single member of the AAP, with consultation from a single AAPC, for individualized assessment.

2. **Final Determination:** After this AAP review, the Claims Administrator will issue an Award or Denial Notice on each claim, which will be subject to appeal under Section 9.5 of the Settlement Agreement.

It is noted that some of these 66 Monetary Award claims are subject to another Audit investigation or an Audit Proceeding before us. These claims will not proceed under the remedy above unless and until the other Audit issues are resolved without denial of the claim.

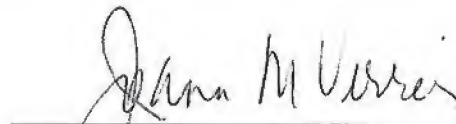
Several players who were seen by one of these neuropsychologists have withdrawn their claims. Under Audit Rule 13, a Retired NFL Football Player with a claim in Audit may at any time withdraw that claim. As is always the case, that player may be examined by a Qualified BAP Provider (if eligible for the BAP) or by a Qualified MAF Physician and, if found to have a Qualifying Diagnosis, substitute a new Diagnosing Physician Certification, including a medically indicated date of diagnosis (that may precede the date of the new exam), to the Claims Administrator for review in the claims process.



Wendell Pritchett, Special Master

9/11/18

Date



Jo-Ann Verrier, Special Master

9/11/18

Date

IN RE: NATIONAL FOOTBALL
LEAGUE PLAYERS' CONCUSSION
INJURY LITIGATION

MDL No. 2323

Hon. Anita B. Brody

¹ The Effective Date of the Settlement Agreement is defined in §2.1(jj) as the day following the deadline for appeals of the Court's approval of the Settlement Agreement, which was January 7, 2017. *See NFL Concussion Settlement Website*, "Basic Information", FAQ #11.

audit by the Claims Administrator, pursuant to §10.3(c) of the Settlement Agreement. (Doc. 116229.)

Claimant's award was formally approved following completion of the audit, and he received a new Notice of Monetary Award on December 4, 2017. (Doc. 145915.) On January 3, 2018, thirty days from Claimant's receipt of this Notice, the NFL Parties appealed. (Doc. 150806.) The Special Master requested that Claimant's case be reviewed by the AAP; at this point, the AAP determined that [REDACTED] claim should be denied. (Doc. 172127, at 1-2.) On May 31, 2018, the Special Master granted the NFL Parties' appeal and denied the claim. (Doc. 173671.)

On June 21, 2018, Claimant filed an Objection to the Special Master's ruling. (Doc. 179984.) The court remanded the matter to the Special Master for further explanation of the determination. (Doc. 180031.)

STANDARD OF REVIEW

The Special Masters must decide an appeal of a Monetary Award based on a showing by the appellant of clear and convincing evidence that the determination of the Claims Administrator was incorrect. (Order Appointing Special Masters, 5.) "Clear and convincing evidence" is a recognized intermediate standard of proof—more demanding than preponderance of the evidence, but less demanding than proof beyond a reasonable doubt. In re Fosamax Alendronate Sodium Prods. Liab. Litig., 852 F.3d 268, 285-86 (3d Cir. 2017) ("Black's Law Dictionary defines clear and convincing evidence as 'evidence indicating that the thing to be proved is highly probable or reasonably certain.'").

DISCUSSION

A. Whether the NFL Parties Timely Appealed

Claimant argues that the NFL Parties waived their right to an appeal by failing to submit their Appeals Form within thirty days of the initial Notice of Monetary Award Claim Determination, as required by §9.7(a) of the Settlement Agreement. (Doc. 153235, at 2.) As this is a threshold issue that would preclude the Special Master's review of the Claim Determination, this issue must be determined before evaluating the merits of the appeal.

Section 9.7 of the Settlement Agreement requires the submission of an Appeals Form "no later than thirty (30) days after receipt of *a* Notice of Monetary Award Determination" (emphasis added). There is no requirement in the Settlement Agreement that the Appeals Form must be submitted within thirty days of *the first* Notice of Monetary Award Determination. Nor is there any restriction on appeals following a Notice of Monetary Award Determination resulting from the completion of an audit.

Claimant states that he received an initial Notice of Monetary Award Determination on July 20, 2017. (Doc. 153235, at 1.) His claim was then selected as part of the monthly 10% audit of eligible claims as dictated by §10.3 of the Settlement Agreement. Following conclusion of the

audit, Claimant received another Notice of Monetary Award Determination on December 4, 2017. By the express terms of the Settlement Agreement, nothing precludes an appeal from either party within thirty days of such a Notice.

Claimant's Notice of Monetary Award Determination from December 4 explicitly includes a "Deadline to Appeal" of January 3, 2018. (Doc. 145915, at 1.) The NFL Parties filed their Appeals Form on January 3; accordingly, the NFL Parties' appeal was timely by the terms of §9.7 of the Settlement Agreement. (Doc. 150806.)

B. Whether There is Clear and Convincing Evidence That Claimant Should Have Been Denied a Monetary Award

Based on the advice of the Appeals Advisory Panel, the Special Master concluded that there is clear and convincing evidence that Claimant's diagnosis was not generally consistent with the Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment as defined in the Settlement Agreement. For living Retired NFL Football Players diagnosed prior to the Effective Date, a diagnosis of Level 1.5 Neurocognitive Impairment must be accompanied by "evaluation and evidence generally consistent with the diagnostic criteria set forth in" the relevant section of Exhibit A-1 of the Settlement Agreement. (Settlement Agreement Ex. A-1, hereinafter "Injury Definitions.") Claimant's records do not provide evidence generally consistent with the diagnostic criteria set forth in the Settlement Agreement for Level 1.5 Neurocognitive Impairment.

A Retired NFL Player seeking a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment must exhibit (1) concern that there has been a severe decline in cognitive function, (2) evidence of a moderate to severe cognitive decline from a previous level of performance, and (3) functional impairment. (*Id.*) Claimant has fulfilled the first requirement by virtue of his own report. However, based on the advice of the AAP, the Special Master concludes that there is clear and convincing evidence that Claimant's records are not generally consistent with requirements (2) and (3).

As noted by the AAP Consultant, Claimant's cognitive assessment does not establish moderate to severe cognitive decline. Claimant's records do not include evidence supporting a 1.0 (Mild) score in the Home & Hobbies category, which requires "definite impairment of function at home; more difficult chores abandoned; [and/or] more complicated hobbies and interests abandoned."

CONCLUSION

For the foregoing reasons, Special Master grants the appeal of the NFL Parties and denies the grant of a Monetary Award.

Date: September 24, 2018


Wendell E. Pritchett, Special Master

IN RE: NATIONAL FOOTBALL	:	No. 2:12-md-02323-AB
LEAGUE PLAYERS' CONCUSSION	:	
INJURY LITIGATION	:	MDL No. 2323
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	:	Hon. Anita B. Brody
THIS DOCUMENT RELATES TO:	:	
NFL PARTIES' REQUEST FOR	:	
COMPULSORY AAP/AAPC REVIEW	:	
OF MONETARY AWARD CLAIMS	:	

This matter requires the Special Master to determine whether an Appeals Advisory Panel member (“AAP”) or Appeals Advisory Panel Consultant (“AAPC”) must review all claims that turn on the sufficiency of the medical evidence behind the claimant’s Qualifying Diagnosis. For the reasons stated below, the Special Master holds that compulsory AAP/AAPC review is not required by the Settlement Agreement.

The NFL Parties have requested a stay of payment and re-review of all appeals that have not already been reviewed by the AAP/AAPC and “turn on technical, medical grounds,” including diagnoses made by Qualified MAF Physicians (Letter from NFL Parties to the Special Master dated June 28, 2018 (“NFL Letter”), at 1-2.) While acknowledging that Qualified MAF Physicians are approved by the parties, the NFL Parties state that it was “always the intent of the Parties that AAPs and AAPCs would be used on appeals involving [diagnoses made by] . . . Qualified MAF Physicians.” (NFL Letter, at 2.)

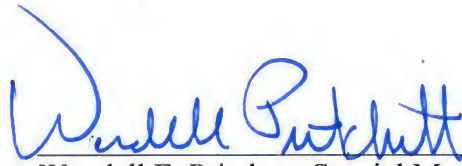
Certain categories of compulsory AAP/AAPC review are explicitly included in §6.4(a) of the Settlement Agreement. These include Qualifying Diagnoses made prior to the Effective Date by neurologists, neurosurgeons, and physicians who are *not* Qualified MAF Physicians. The fact that Qualifying Diagnoses made by Qualified MAF Physicians are not included in this list further clarifies that the parties did not intend for compulsory AAP/AAPC review of such diagnoses.

Requiring AAP/AAPC review of all claims turning on medical grounds would unduly limit the discretion given to the Court and the Special Master under the plain language of the Settlement Agreement. Such compulsory review would also burden Settlement Class Members with an additional requirement for approval of claims beyond the requirements set forth in the Agreement. For these reasons, the Special Master denies the NFL Parties' request to compel AAP/AAPC review of all claims that turn on the sufficiency of the medical evidence supporting the Qualifying Diagnosis.

CONCLUSION

The NFL Parties' request for a stay of payment of claims pending AAP/AAPC review is denied.

Date: September 28, 2018


Wendell E. Pritchett, Special Master